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NO. 88-1037

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1988

STATE OF ARIZONA,
Petitioner,

-vs-

HONORABLE DANIEL E. NASTRO,
Respondent,

ELDEN GARDNER,
Real Party in Interest.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

SUPPLEMENTAL BRIEF OF THE STATE OF ARIZONA TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a defendant, who is not of the same race as a juror who is removed by the prosecutor's use of a peremptory strike, have standing to assert the equal protection rights of the juror.

2. If such a defendant has the standing to assert the equal protection rights of a juror who is struck, what nature of proof is necessary to make a prima facie showing of a violation of the juror's equal protection rights.

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STATEMENT OF THE CASE

Real Party in Interest Gardner is white; his trial attorney is black. (R.T. of Sept. 25, 1986, Appendix A at A-4.) The panel of jurors contained two blacks, Lawrence Griffin and Robert Bronner. (Id. at A-22.) The prosecutor used two peremptory strikes to remove these two jurors. (Id. at A-3.) Upon motion of the defendant, the trial court ordered the prosecutor to give reasons for these strikes to determine whether the prosecutor's actions were racially motivated. (Id. at A-15.) The trial court based this ruling on (1) the right of the defendant to a fair and impartial jury and (2) the right of any American citizen to serve on a jury. (Id. at A-16, A-20.) The prosecutor refused to disclose his reasons for the strikes. (Id. at A-6.) The trial court did note

that there appeared to be nonracial reasons for striking these two individuals: one worked nights and might not be able to stay awake during the trial, and the other had a prior conviction for assault. (Id. at A-24, A-25.) The prosecutor still refused to disclose his reasons and sought review of the trial court's ruling. (Id. at A-27.) The Arizona Supreme Court upheld the ruling of the trial court. State v. Superior Court (Gardner), 157 Ariz. 541, 760 P.2d 541 (1988). The state then petitioned this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

Because both the trial court and the Arizona Supreme Court based their rulings in part on the conclusion that the actions of the prosecutor violated the equal protection rights of the two

jurors, this case presents the issue left unresolved by Holland v. Illinois, 58 U.S.L.W. 4162 (U.S., Jan. 22, 1990).

ARGUMENT

BECAUSE THIS CASE PRESENTS THE ISSUE LEFT UNRESOLVED BY HOLLAND V. ILLINOIS, AND BECAUSE THE LEGAL COMMUNITY NEEDS TO HAVE THIS ISSUE RESOLVED, THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI.

In Batson v. Kentucky, 476 U.S. 79 (1986), this Court held that a prosecutor's discriminatory use of peremptory strikes violates the equal protection rights of the persons struck from the jury, and that a defendant may make a prima facie showing of discrimination by showing that he or she is a member of a cognizable racial group and that the prosecutor has used the peremptory strikes to remove from the

venire all members of the defendant's race. 476 U.S. at 96. In Holland v. Illinois, this Court held that a defendant who is not of the same racial group as the persons struck from the venire has standing to raise a claim under the sixth amendment, but that the sixth amendment's right to a jury comprising a fair cross section of the population extends only to the panel from which the attorneys make their strikes and does not extend to the actual petit jury selected. 58 U.S.L.W. at 4163, 4164. This Court specifically did not address the question whether a defendant who is not of the same racial group as a person struck from the venire has standing to raise a claim based on the equal protection rights of the person who was struck. 58 U.S.L.W. at 4163; 58 U.S.L.W. at 4166 (Kennedy, J.,

concurring); 58 U.S.L.W. at 4167 (Marshall, J., dissenting); 58 U.S.L.W. at 4171 (Stevens, J., dissenting).

In the present case, the trial court based its ruling in part on the reasoning that the prosecutor's actions, if racially motivated, would violate the equal protection rights of the persons struck:

> So my decision is two-fold.
>
> Number one, with respect to the rights of this defendant to equal protection along the lines that I have just stated and I think to the basic inherent right of a trial juror, of a black to serve as a member of a jury . . . .

(R.T. of Sept. 25, 1986, Appendix A at A-16.)

> [I]f it appears under the circumstances that a juror may be

> excluded solely on the basis of his black origin, that that is a right that has to be protected and that does permit me to ask the threshold question of counsel, and that I would then indicate that on that basis, I would find that a prima facie case had been shown to permit me to ask that question.

(Id. at A-20.) The Arizona Supreme Court noted the two different reasons for the trial court's ruling:

> Relying on the equal protection clause of the fourteenth amendment and, arguably, also on the sixth amendment right to a trial by an impartial jury, the judge ruled that he had a proper basis to inquire into the prosecutor's motives in using the peremptory

challenge to strike the Black veniremen.

State v. Superior Court (Gardner), 157 Ariz. at 542, 760 at P.2d 542. The Arizona Supreme Court noted that, in its earlier case of State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985), it had applied the rule in Swain v. Alabama, 380 U.S. 202 (1965), to attacks on the discriminatory use of peremptory strikes based both on equal protection grounds and on sixth amendment grounds. 157 Ariz. at 544, 760 P.2d at 544. It then overruled Wiley and upheld the ruling of the trial court. 157 Ariz. at 544, 760 P.2d at 544. It first concluded that the defendant had standing under the sixth amendment to challenge the use by the prosecutor of peremptory strikes. 157 Ariz. at 544, 760 P.2d at 544. It next concluded that the sixth amendment

guarantee of an "impartial jury" extended not just to the selection of the jury panel, but also to the selection of the trial jury itself. 157 Ariz. at 545, 760 P.2d at 545. It finally concluded as follows:

> The harm done by such state discrimination is not limited to violation of a defendant's constitutional rights. It also damages our system of justice by depriving minorities of their opportunity for jury service, one of the most important privileges and responsibilities of citizenship.

157 Ariz. at 545, 760 P.2d at 545.

The first conclusion, that a defendant has standing under the sixth amendment to challenge the use of peremptory strikes, is consistent with this Court's opinion

in Holland. 58 U.S.L.W. at 4163. The next conclusion, that the sixth amendment guarantee of an "impartial jury" extends not just to the selection of the jury panel, but also to the selection of the trial jury itself, is opposite to this Court's opinion in Holland. 58 U.S.L.W. at 4164. If that were all that the Arizona Supreme Court had said, the remedy would be to remand the matter for reconsideration in light of Holland. But all the Arizona Supreme Court would do is eliminate that part of its opinion based on the sixth amendment claim, and reach the same result relying on that part of its opinion based on the equal protection claim. This case therefore squarely presents the question left open by this Court's decision in Holland: Whether a defendant who is not a member of the same race as a juror who is struck may raise a

claim based on the equal protection rights of the person who is struck. Further, assuming that such a defendant has standing to assert the equal protection rights of a juror, this then raises the question of what nature of proof is required to make a prima facie showing of discrimination and thus shift the burden to the other side to justify the use of the strikes. A grant of the petition for writ of certiorari is therefore necessary to resolve these questions.

CONCLUSION

This Court's decision in Holland left open the question whether a defendant who is not a member of the same race as a juror may raise a claim based on the equal protection rights of that juror, and, assuming that such a defendant has standing to assert such a equal

protection claim, what nature of proof is required to make a prima facie showing of discrimination and thus shift the burden to the other side to justify the use of the strikes. Because both the trial court and the Arizona Supreme Court based their decisions in part on the equal protection claim, this case presents these questions. Petitioner therefore requests that this Court grant petition for writ of certiorari and resolve these questions.

Respectfully submitted,

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DATED: February 8, 1990

CERTIFICATE OF SERVICE

THREE COPIES each of this Brief were mailed February 8, 1990, to:

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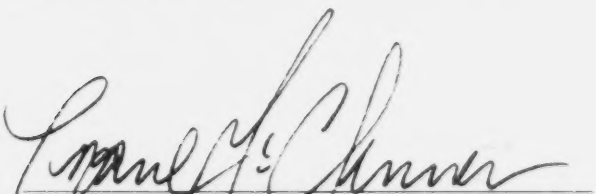
All parties required to be served have been served.



CRANE McCLENNEN
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CRM86-0631/2449D

APPENDIX A

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	)	
	)	
Plaintiff,	)	No. CR-155598
	)	
vs.	)	
	)	
ELDEN MIT GARDNER,	)	
	)	
Defendant.	)	
	)	

Phoenix, Arizona
September 25, 1986

BEFORE: THE HONORABLE DANIEL E. NASTRO

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MARGARET HARCARIK
Court Reporter

APPEARANCES:

FOR THE STATE: TIM HOLTZEN
Assistant Attorney General

FOR THE DEFENDANT: JUDIS R. ANDREWS
Deputy Public Defender

THE COURT: This is cause number 155598, entitled State of Arizona versus Elden Mit Gardner.

The record should reflect that we are in chambers.

The record should reflect at this time the presence of --

MR. HOLTZEN: Tim Holtzen from the Attorney General's office on behalf of the State of Arizona.

MR. ANDREWS: J. Andrews from the Maricopa Public Defender's office. Present is my client, Elden Gardner.

THE COURT: The record should reflect at the conclusion of yesterday's proceedings, counsel indicated they would make available to the Court the case of Batson versus Kentucky, and that the Court has at this time the copy of that case and has considered the case and the ramifications of the case with respect to the issue that counsel have raised.

The record should further reflect that the Court has conferred informally with counsel about the various aspects that are at issue here, and the Court has given a preliminary indication to counsel concerning its feelings, and counsel indicated that a special action would be taken and at this time, gentlemen, we will be making our record.

Mr. Andrews, do you wish to proceed first?

MR. ANDREWS: Yes, your Honor.

I raised on yesterday last the issue of Batson versus Kentucky, with regard to my client, Elden Gardner.

I call the Court's attention to page 1720 of the Supreme Court Reporter, 106. The case is cited at 106, Supreme Court Reporter, 1720, and specifically the language, and it is the last paragraph, left side, beginning with, "It was impermissible for a prosecutor to use his

challenges to exclude blacks from the jury for reasons wholly unrelated to he outcome of the particular case on trial," and I underlined or, "to deny to blacks the same right and opportunity to participate in the administration of justice enjoyed by the white population."

On yesterday last you Honor, Mr. Holtzen struck the only two members of the jury panel who were black. That raises two issues in my mind, and I think Batson is on point with both those issues.

The first issue being, whether or not the prosecutor can use preemptory strikes at will to deny blacks an opportunity to participate in the administration of justice, by being of service on the venire panels as well as juries.

My thought being this, there is only two blacks in a panel of 35 sent up to us in the first place. Now, Mr. Holtzen has struck both the blacks from the jury

panel by the use of preemptory strikes. As a result of that, blacks have been denied in this case, this particular case, and I believe Batson speaks to a case by case assessment of an opportunity to participate in the fair administration of justice.

I would bring to the Court's attention the point although my client is white, I happen to be black, and that I believe and I am of the opinion that Batson goes to that issue and certainly the Rousseau case out of California which is commented on by Justice Marshall in his concurrent opinion in the Batson case, which speaks to the issue that my client, Mr. Gardner, may be being deprived of a fair opportunity for trial as well as due process because blacks are stricken from the jury panel solely because in his case he has the burden, if you will, or the privilege, and I don't know which one it

is, of being saddled with a black attorney.

As a result of that, he does not have an opportunity for the equal protection of law guaranteed under the constitution of having a fair jury panel made up of peers from the various communities.

Now, I am of the opinion, your Honor, that these matters are covered in Batson. I am of the opinion that my client is entitled to those things that I have stated. I am of the opinion that blacks are entitled to participate in the administration of justice and I think those things are set out quite clearly in Batson versus Kentucky, the cite I previously have given to the Court, and for those reasons, your Honor, I would urge and I would say to the Court that Batson provides the remedy, and that is that once Mr. Holtzen has stricken these people that the Court has a right to

inquire of him as to why he has stricken these people, who are the only two blacks that were on the panel, that upon the Court being satisfied as to his answers, I have no further remedy. However, I do have a right and the Court has a right to make inquiry of Mr. Holtzen as to why they have been stricken.

That's all I have.

THE COURT: Mr. Holtzen?

MR. HOLTZEN: Thank you, your Honor. May it please the Court. I think the case law in Arizona in the past, and from the United State Supreme Court still protects the area of the mental processes of a lawyer in using his preemptory strikes.

The case of Batson versus Kentucky, recently granting a limited situation wherein those mental processes can be probed. My position is, it is very clear in the language of the United States

Supreme Court that before we begin probing the minds of lawyers as to why they have used their preemptory challenges, there is a least a two-step process. The first step is clear.

In Supreme Court Opinion, 106, Supreme Court Reporter, 1722, where it says, "The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment."

There is no showing that Mr. Gardner is such a member of such a group.

Also on page 1723, the Court again refers to it when it says at the top of the page --

THE COURT: Sorry, what page?

MR. HOLTZEN: Page 1723, 106, Supreme Court Reporter, at 1723, where the Court says, "To establish such a case, the defendant first must show that he is a member of a cognizable racial group," and

then it goes on to talk about the further showing. That would be the second step of showing of a prima facie case, that the strikes by the prosecutor were that sort of intentional discrimination by the strikes. My approach is two-fold. Number one, there is absolutely no showing of this defendant having any standing to challenge my actions in preemptory strikes nor is there any justification for violating that rule that protects the lawyer's produce in his own mind but secondly, I submit that there is no showing before the Court to meet the second case, a prima facie case that my action in striking two black jurors, that those actions alone are sufficient to show a prima facie case that there were any discriminatory actions against the group of blacks.

I submit that it is in essence a question of the defendant's standing to

make this challenge. He has no standing.

Secondly, there is no prima facie showing -- the fact that Mr. Gardner is white does not give him the right to question the challenging of anybody or, excuse me, the challenge of a prosecutor as to any particular juror who may not be of the same category as he.

Perhaps if there were only two witnesses on the panel and I stroke those, Mr. Gardner may have that right then. He may have that standing, but his personal rights under the 14th Amendment, are the only things he can invoke.

He can't invoke Mr. Andrews' right, that is, his black attorney. He cannot now be enshrined with that special recognition because he has a black lawyer. I think I submitted informally before the argument if Mr. Gardner then were to have a black lawyer and an Italian investigator and a Chinese prime

witness for an alibi, would he then be able to say that that additional ethnic origin, or those additional ethnic origins entitled him to challenge any preemptory strike of any of those individuals, but I think as I have understood in the Court's informal thought exchange with us, that the Court's opinion is that Mr. Gardner would have the right regardless of who represents him or who his investigator is to challenge, if the prosecutor essentially, systematically excluded any racial group or any ethnic group and I think if I understood the court correctly, really there are two questions.

First of all, would he have that right regardless of who represents him and secondly, is there in this particular case because his attorney is black, a right of Elden Gardner to make this challenge and probe, and therefore since

I say that neither of the two have been met, neither the standing nor the prima facie showing that I ought not and will not answer the question at this time and ask for a stay to approach the Appellate Court.

THE COURT: Mr. Andrews, do you have anything further?

MR. ANDREWS: Briefly, your Honor. I simply would point out to the Court at 106, Supreme Court Reporter, at 1727, Justice Marshall, in his concurrent opinion basically sums up the position that Mr. Holtzen, I don't believe really addresses and that is this, and I am quoting from the opinion of Justice Marshall.

"This court explained more than a century ago that in the selection of jurors to pass upon a defendant's life, liberty or property, there shall be no exclusion of his race and no

discrimination against them because of their color."

It goes on to say that, "Exclusion of blacks from a jury, solely because they are black," citing Justice Rehnquist, "Is at best based upon crudely stereotypical and, in many cases hopelessly mistaken notions."

Then he includes what I think is the relevant issue in Batson, by saying, "I wholeheartedly concur in the Court's conclusion that use of the preemptory challenge to remove blacks from juries on the basis of their race, violates the Equal Protection Clause." and I think that's behind the entire Batson case and I think that the rulings of the Court are proper and I think that the constitution protects by the Equal Protection Clause, the right of blacks to serve on the jury and not be excluded solely because of race, and my client's right is not to be

jeopardized by not having any blacks on the jury solely because his attorney happens to be from the minority group.

THE COURT: Okay, gentlemen, I have listened to the respective arguments of counsel and I have further read the cases that counsel have referred to and I am aware of the particular factual background in the Batson versus Kentucky case wherein we had a black defendant and four veniremen who were of black origin who were excluded by the exercise of preemptory challenges and I am aware of the statement and rationale of the majority in the Batson case which stated in essence that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black

defendant and, I am aware as Mr. Holtzen indicated in that case, the focal point of the decision was on the right of this black defendant to a fair and impartial jury and that if the sole reason for the exercise of the preemptory challenge was because of the veniremen's racial origin, then that defendant was being denied the equal protection of law.

I am also aware of the use by the Court of the conjunction, "or", and in reading the opinion of the Court, and it is my determination that the Court is saying inferentially there, that you cannot exclude a juror solely on the basis of his origin and that a corollary of that is, and I think a basic right that an American citizen has, be he Black, Caucasian or of Asian origin, is to serve as a trial juror and participate in the democratic process if he otherwise qualifies. And that in a situation where

there is a preemptory challenge and the Court under the circumstances, feels that on the totality of the circumstances, that it is appropriate to inquire of the prosecutor as to the reason for the exclusion and if the Court determines that there is a reasonable reason, over and above the elimination of that juror because of racial origin, that would be the end to it and I am aware of Justice White's I believe, concurring opinion and the problems that may have been set forth with the judge having to look behind the mental processes of the prosecutor and I think Judge White discusses that on page 1728 of the opinion.

I have also given this some in-depth analysis and we have here a situation where we have a white defendant being represented by a black attorney and, is this white defendant being denied equal protection of the law if a juror of black

origin is being selectively eliminated because of his origin, because there may be a feeling of empathy or sympathy with the black attorney. Then, that white defendant I feel is being denied equal protection and that the rationale of Bateman occurs. So my decision is two-fold.

Number one, with respect to the rights of this defendant to equal protection along the lines that I have just stated and I think to the basic inherent right of a trial juror, of a black to serve as a member of a jury, and in reading the cases, and I focused in on the case of People versus Rousseau, 129, Cal. App., 2nd, 526, 179, California Reporter, 892, a 1982 case, in which there were just two preemptory challenges exercised against the two jurors who were black but, and the court indicated that the defense failed to meet the burden on appeal.

However in focusing in on the issue as to, do we consider solely the rights of the defendant to equal protection of the laws or must take into consideration the rights of the trial juror who has been summoned as a juror to sit and not be excluded solely on the basis of his color or national origin and the California Court on page 536 stated as follows: "Appellant contends that the prosecutor systematically excluded blacks from the jury, thereby violating appellant's right to trial by jury." California Constitution, Article One, Section Sixteen. "A prosecutor's use of preemptory challenges is presumed to be constitutionally permissible. The presumption may be rebutted if the defendant establishes a prima facie case that the prosecutor has challenged jurors on the basis of group bias alone." People versus Wheeler, 1978, 22 Cal.3rd,

258, 278, 280, 148 California Reporter 890, 538, P.2d, 748. "To advance a claim of discriminatory exclusion, the defendant must establish as complete a record of the circumstances as is feasible.

Second, he must establish that the persons excluded are members of a cognizable group.

Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias."

"The defendant may demonstrate systematic exclusion by showing that, one, the prosecutor has excluded all or most of an identified group from the venire; two, he has used a disproportionate number of preemptory challenges against members of this group identification in common; or four, apart

from their group identification they are as heterogeneous as the community as a whole." People versus Wheeler, supra, 22 Cal.3rd at page 280.

"If the defendant makes a prima facie case, the burden shifts to the prosecution to show that the preemptory challenges were not predicted on group bias alone."

Now, that apparently is the special question. Considering the totality of the circumstances and the answers phrased by the two black veniremen and their willingness to serve as trial jurors and the counsel indicates that they found them to be fair and impartial and also I should point out that apparently the first preemptory challenge was exercised by Mr. Holtzen and then the next six by Mr. Andrews, not following the recent pronouncement or the recent law with respect to alternates, then out of the

remaining 14 veniremen, these two blacks were excluded. I fell that for the reasons that I have stated and, let me digress a moment and go back.

I believe that the Rousseau case focuses in on the rights also of blacks or members of any minority, or any group to serve as a juror and that in the democratic process as the trial judge I have be cognizant of that fact and if it appears under the circumstances that a juror may be excluded solely on the basis of his black origin, that that is a right that has to be protected and that does permit me to ask the threshold question of counsel, and that I would then indicate that on that basis, I would find that a prima facie case had been shown to permit me to ask that question.

Now, I recognize from our conversations, gentlemen, that a formal, written petition for a stay has to be

prepared by counsel. Is that correct, gentlemen?

MR. HOLTZEN: Yes.

MR. ANDREWS: Correct, your Honor.

THE COURT: And correct me if I'm wrong, counsel conferred with a clerk of the Court of Appeals and he indicated that that would be, that that's the process and in that regard, gentlemen, I propose to do the following. I propose to discharge the jury insofar as having them telephone in to court tomorrow between the hours of 3:00 and 4:00 to advise as to whether this case is to be continued to Monday based upon whether the stay is or is not granted.

I further propose to admonish this jury not to discuss this matter, that a legal matter has come up which requires clarification and that if there is any reporting of this, either in any news media, that they are not to read that

article or if it comes upon on the radio, to turn the radio off or leave the room if it's on a T.V. and not to discuss it with members of their family.

Now, is there anything further, gentlemen, of a procedural standpoint that you think should or needs to be done or addressed? Can you think of anything?

MR. HOLTZEN: There are only a couple of factual things I want to get clarified, but the procedure in terms of what to do with the jury and what needs to be done concerning the special action, I have nothing further, except I guess, specifically what I have asked is that this Court stay the action until Monday morning for me to have the opportunity to ask the Appellate Court for a stay during the pendency of their consideration.

THE COURT: And I am granting that request for a stay.

Mr. Andrews, do you have anything?

MR. ANDREWS: No, your Honor.

THE COURT: Mr. Holtzen, you had some factual questions?

MR. HOLTZEN: First of all, I am not sure if on the record we ever identified who the black veniremen were.

THE COURT: The black veniremen were, and I am going the numbers of the jurors, juror number eighteen, Lawrence Griffin, and he was among the original 21 empaneled.

Juror number twenty-five, Robert Bronner, and if my memory serves me correctly, he was the last juror empaneled after I had excused juror number twenty, Kathy Guiher, for cause and that was really almost at the conclusion of the voir dire.

MR. HOLTZEN: The other thing, we had discussed informally was at this point the court came to the conclusion that Mr. Griffin, who was the juror who told

the Court he probably couldn't stay awake through the trial, that particular juror, you're not inquiring as to --

THE COURT: Let me make my position. When we were talking today informally, if I recall my statements in regard to that, was when we were talking about the questions propounded concerning your making an answer, I said that assuming again, and this is when I think we were talking about what the trial judge has to consider as set forth by Justice White on page 1728, I said that in all probability and the answer made to say that he, Mr. Griffin indicated that he was working nights and that I believe he said sometimes he gets five hours sleep or something a night and I questioned him on that -- he needs at least seven and I said to him, I said, okay, if you have any problems or are tired, let us know. Raise your hand, and we'll take a recess

to refresh you, and he said yes, he would, and did say he could be fair and impartial and I said if they reason were propounded to me and then speaking in the context of Justice White, I struck him and I said I'd probably be very -- may have well stricken him.

Again, I'd have to compare it to who else was on the list. Out of deference to him, I probably would be in a position, and I would consider that to be a valid reason for a strike and I think Mr. Andrews may have chimed in also that he said that was so. Mr. Bronner indicated, you know, his willingness to serve. I know he did say, I believe he had a past history, a felony for aggravated assault, or assault, and probation and if my memory serves me correct, he said it was five years ago.

MR. ANDREWS: A good time ago.

THE COURT: So that is where I was coming from and I was talking about that in the context of what the judge had to go through, the trial judge, in terms of evaluating the rational for the strike.

MR. HOLTZEN: Okay, and let me make sure it's clear. I understood during the noon hour that your ruling was, was going to be that I would have the inquiry made to me of my reasons for striking Mr. Bronner. I was not under the impression you were going to be asking as to both black individuals.

THE COURT: Since both were black, I necessarily have to ask as to both blacks.

MT. HOLTZEN: Is it then the Court's conclusion that the defendant has come forward with the prima facie showing as to both of those individuals, excuse me, the prima facie showing requiring me to answer.

THE COURT: Yes, since there were only two blacks on the jury panel and those have been stricken.

MR. HOLTZEN: And the Court, under the totality of the circumstances, considers that then the Court is entitled to inquire as to my reasons for striking both of those men?

THE COURT: Right. Okay, are there any other points you wish to clear up, gentlemen?

MR. ANDREWS: No.

MR. HOLTZEN: I don't think so, your Honor.

THE COURT: Now, so we understand, this matter is bing stayed until next Monday and I am going to have the jury indicate and call up and I am going to say Monday at 11:00, Okay?

MR. ANDREWS: Fine.

MR. HOLTZEN: Sorry?

THE COURT: The jury is going to call tomorrow but I am staying this, for the record, to Monday at 11:00. The jury will be required to call tomorrow.

MR. HOLTZEN: Between 3:00 and 4:00?

THE COURT: Right. Okay, and I think I'll give, tell them to call 261-5976, which is one of the other lines. All right?

MR. HOLTZEN: Okay.

THE COURT: Which normally is not being used, so that there's no delay in their getting through.

MR. HOLTZEN: If we have 21 jurors calling in on our --

THE COURT: It will be from 3:00 to 4:00 and I will tell them to call in.